

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON
THE NATIVE AMERICAN GRAVES PROTECTION
AND REPATRIATION ACT

Washington D.C.
April 20, 1999

Statement of:
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On Behalf of
The Estate of Tasunke Witko
and
The Rosebud Sioux Tribe NAGPRA Committee

Good morning. My name is Robert Gough and I have the privilege of being the attorney for the Estate of Tasunke Witko, or Crazy Horse, the great Lakota leader. I also serve as a member of the Rosebud Sioux Tribe's NAGPRA committee. It is indeed an honor to appear before this distinguished committee on behalf of both the Estate and the Rosebud Sioux.

I come before you today to address a case of ongoing concern with regard to a lack of compliance with, and enforcement of, the notification procedures established under the Native American Graves Protection and Repatriation Act. This is a case which involves:

- A respected, private institution of higher learning, namely, Washington College of Chestertown, Maryland;
- A buckskin shirt, fringed with human hair, believed to have belonged to Crazy Horse;
- A lack of compliance by Washington College with either the spirit or the letter of the Native American Graves Protection and Repatriation Act; and
- A lack of enforcement of the civil penalty provisions by the U.S. National Park Service for such non-compliance.

COMPLIANCE IS A CRITICALLY IMPORTANT THRESHOLD ISSUE

The Native American Graves Protection Act was initially designed:

- to provide a procedure within which the rights of ownership of Indian, Alaska Native, and Native Hawaiian (Native American) human remains and artifacts, including funerary objects, religious artifacts, and objects of cultural patrimony, found on Federal or tribal lands could be clarified;
- to establish criminal penalties for the sale, purchase, or transport of Native American human remains or cultural artifacts without a legal right of possession;
- to direct federal agencies and museums receiving federal assistance to identify the geographic and tribal origins of human or cultural artifacts in their collections, and to require the return of the remains or artifacts to the appropriate tribe or Native American organization upon request;
- to establish a Department of Interior advisory committee to review the identification and repatriation processes for Native American human remains and cultural artifacts held by federal agencies and federally assisted museums; and, finally,
- to establish civil penalties for museums failing to comply with requirements of this act.

During the congressional hearing on the proposed NAGPRA legislation held May 14, 1990, distinguished members of this committee recognized the important human rights issues at stake in the legislation which outlined “a process that provides the dignity and respect that our Nation's first citizens deserve” (Senator John McCain), and that as proposed, NAGPRA provided a cross-cultural “lesson in etiquette, in manners, about how people treat each other. If you read this report, it is almost a rule book on how you treat others with respect” (Senator Conrad).

However, for these goals of dignity and respect to be realized, compliance with the threshold provisions of the act must be ensured. Our concern today raises the crucial question of initial compliance by federally funded institutions in submitting the required summaries or inventories. Institutional compliance with the initial disclosure notifications must be ensured so that interested Native American tribes and descendants can participate in the federally outlined process and review those objects and artifacts held by museums and other such institutions. Museums simply can not unilaterally pre-determine that particular objects or artifacts fall outside the specific NAGPRA categories and thus exempt themselves from compliance with the process. The mandatory language of Section 10.8 (a) of the act is abundantly clear:

(E)ach museum that has possession or control over collections which **may** contain unassociated funerary objects, sacred objects, or objects of cultural patrimony **must complete a summary** of these collections based upon available information held by the museum. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution. (Emphasis added).

No proper determination of the applicability of the categorical provisions of the act can occur without institutional compliance with the threshold notice provisions.

This is a critical procedural concern, for without institutional compliance in providing the required summaries and inventories, Native participation and federal regulation are pre-empted and the entire process is rendered ineffective. Without initial compliance, based either upon the good faith cooperation of the subject institution, or upon the diligent enforcement by the federal agency charged with carrying out the requirements of this law, all subsequent provisions of this balanced and diligently crafted act are rendered hollow.

It appears from the record, on file with the National Park Service, that, for the past 60 years, Washington College has held a collection of Native American artifacts, including a shirt said to be trimmed with “human scalp” and purported to have belonged to the famed Lakota leader, Crazy Horse. The Estate and Tribe have made repeated attempts to examine the objects and artifacts in this collection and related documentary evidence as to its provenance. Washington College has knowingly ignored these requests and has proceeded to sell the bulk of this collection, including the shirt, through Sotheby's Auction House in New York City on May 21, 1996, without having filed either an summary or inventory of their collection, as required under the Native American Graves Protection and Repatriation Act.

Apparently, Washington College unilaterally decided, based upon “expert advice” and a written, legal opinion, that it did not need to comply with the requirements of federal law. Incredibly, the College presumed on its own and without the benefit of input from known and interest Native parties, that the objects and artifacts in its Native American collection were not subject to the requirements of the act. Having opted out of any compliance requirements, the College was then free to sell these objects and artifacts through Sotheby’s Auction House to the highest bidder.

We would ask this committee: Where in the law are federally funded institutions possessing items which may be subject to the Native American Graves Protection and Repatriation Act, allowed to presume that federal law does not apply to them? Where in the law are such institutions excused or exempted from filing the appropriate summaries or inventories of their collections based upon their own -- hardly disinterested -- determination that such objects and artifacts in their collections are not subject to the act?

WASHINGTON COLLEGE AND THE CRAZY HORSE SHIRT

We note that Washington College would appear to be an institution of higher learning, pursuant to 45 CFR Section 10.2(3). And further, pursuant to 45 CFR Section 10.2(3), we understand that Washington College, like most such institutions, has received federal funds after November 16, 1990, and no doubt continues to benefit from federal support.

Since long before the passage of the Native American Graves Protection and Repatriation Act, this College, name for the first President of the United States, has had possession or control over a collection, called the "Albee Collection", which contains Native American objects and artifacts which may be subject to the act, pursuant to 45 CFR 10.8(a), namely, unassociated funerary objects, sacred objects, or objects of cultural patrimony, or pursuant to 45 CFR 10.9, human remains and associated funerary objects. Washington College has failed to comply with the timely filing of either a summary or inventory, as required by the law.

Further, such failure has resulted in the sale of the Albee Collection without proper notice to the Tribe or Estate, who are parties known to Washington College as having an affiliation, association and interest in the collection. This sale has materially damaged the Tribe and the Estate through the loss of any opportunity to examine, investigate, research or potentially repatriate such items.

The matter of particular concern to us today is the critical need for action by the United States National Park Service in enforcing the civil provisions of NAGPRA. To date, we are not aware of any enforcement proceedings initiated under the civil penalty provisions of the act. We seek a determination that Washington College has failed to comply with NAGPRA, and that such failure has ultimately resulted in the sale, and subsequent disposal, of the Albee Collection by the College.

We have requested that the Secretary of the Department of the Interior and the National Park Service make an official determination of non-compliance and assess the appropriate civil penalties, pursuant to 45 CFR Section 10.12, to hold Washington College accountable for its

failure to provide a summary and/or inventory by November 16, 1995 or any time thereafter, prior to its sale of the Albee Collection on May 21, 1996.

We first brought this matter to the attention of the National Park Service in writing on June 4, 1996, and have followed-up with letters to the Secretary of the Department of the Interior on June 11, 1997 and a then again on June 25, 1998, with copies to our congressional delegation, and finally, by way of personally appearing before the NAGPRA Review Committee at their meeting convened on December 10, 1998, in Santa Fe, New Mexico. To date we still have no word as to any agency action or determination in this matter.

BACKGROUND INFORMATION

While there are many issues involved in this case, I would like include a statement prepared by Ms. Amanda Burt, a paralegal with Rudnick, Wolfe, Epstien, and Zeidman, of Washington D.C., who provided some background information in this matter to the NAGPRA Review Committee in Santa Fe, on December 10, 1998.

From Ms. Amanda Burt's December 10th presentation:

Good afternoon. I would first like to thank the Review Committee for the opportunity to express our concerns in this forum. Specifically, we are here to address the question of Washington College's compliance with the procedural provisions of NAGPRA, as well as the National Park Service's intended course of action in this matter.

For the record, my name is Amanda Burt. I am currently a paralegal with the law firm of Rudnick, Wolfe, Epstien & Zeidman in Washington, D.C. I am also a 1993 graduate of Washington College.

Most people in this room are probably not familiar with Washington College. As I am well-acquainted with Washington College, I thought it would be helpful to provide some background information about the school. It is located in Chestertown, on Maryland's Eastern Shore and is a private liberal arts institution of approximately 1,000 students. For its part, Chestertown is a small, quiet community comprised of Chesapeake Bay watermen, farmers, retirees, and, for nine months out of the year, college students. Chestertown is not the kind of place that immediately comes to mind as being a "flashpoint" for Native American issues. And yet, this is absolutely crucial to understanding why this case is so important – especially where future instances of non-compliance with NAGPRA are concerned.

For approximately 60 years, Washington College possessed the Albee Collection, a sizeable assemblage of Native American artifacts, most notably of which included a beaded and fringed shirt attributed to legendary Lakota warrior, Crazy Horse, in addition to a headdress said to have belonged to Chief Red Cloud. Interestingly, the placard next to the Crazy Horse shirt proclaimed that it was "trimmed with human scalp."

The Albee Collection would likely have gone unnoticed were it not for a visit to the college in 1992 by the Cheyenne poet, Lance Henson. Henson, who had been invited to the College to read from his poetry, literally stumbled across the Albee Collection -- housed in two shabby trophy cases in an obscure corner of Washington College's library. I have provided photographs for your reference. Aware of NAGPRA, Henson raised the question of the College's rightful ownership of the collection.

At the time, I was working for the student newspaper, The Washington College Elm. I wrote a story about Henson's "discovery" and his concern, especially in light of the recently enacted federal repatriation law, that the artifacts should be returned to the appropriate tribes. Since that time, I have been working together with members of the Crazy Horse family and the Estate to obtain more information about the shirt.

Sadly, the Albee Collection -- including the Crazy Horse shirt -- were sold at Sotheby's in May, 1996, due, in large measure, to Washington College's failure to comply with the requirements of NAGPRA. Although attributed in the auction preview catalogue to an "Important Plateau Man," the shirt sold for a price tag of over \$200,000 -- more than ten times what similar shirts are worth, in dollars.

Today, the question of Washington College's compliance with NAGPRA still remains unanswered. The National Park Service's failure to make a determination in this matter sends the unfortunate message that other institutions like Washington College do not have to comply with the law because they will not be held accountable for their actions, or lack thereof.

Thus, for approximately the past 60 years, Washington College has had in its possession various objects and artifacts, including a so-called "scalp shirt" believed to have been owned and worn by Crazy Horse, i.e. Tasunke Witko. They also held a double-train eagle feather headdress attributed to Red Cloud, along with numerous other items from the estate of Captain Albee.

EFFORTS TO OBTAIN COMPLIANCE

On November 7, 1995 and again on May 12, 1996, on behalf of the Estate of Tasunke Witko and the Rosebud Sioux Tribe NAGPRA Committee, I contacted Washington College to obtain more information about the Albee Collection, including the Crazy Horse shirt and was directed to Mr. Alexander "Sandy" Jones, Chairman of the Washington College Legal Affairs Committee. I informed Mr. Jones that I represented the Estate of Tasunke Witko and the Rosebud Sioux Tribe NAGPRA Committee. I advised him that the certain objects and artifacts in the Albee collection may be subject to NAGPRA. I provided him with a copy of the repatriation act, with what I believed to be the relevant sections marked and highlighted. We made no formal request for repatriation at this time, and sought only to examine the objects, artifacts and any documentation of its provenance.

My initial request to view the objects and artifacts was denied on the grounds that the shirt was not presently on campus, as it was undergoing appraisal and conservation at an undisclosed location, and my follow-up request was denied because the collection had been sold at auction in New York City. It would appear that sometime after being apprised of the appraisal and potential market value of the collection, Washington College decided to profit from its sale rather than comply with the procedural requirements of NAGPRA. This decision of Washington College, made with full knowledge of Native interest in the collection, is shameful and unworthy of the name of its “founding father.”

Since that time, Washington College has unilaterally taken the position that it had no duty to comply with the requirements of NAGPRA. The College’s position is apparently based upon three grounds:

- That Washington College is not a museum.
- That the objects and artifacts in its possession did not fall within the objects covered by NAGPRA, pursuant to 43 CFR 10.2(d).
- That Washington College held good title to the Albee Collection.

We need not concern ourselves with the third point concerning the issue of title, at this time, as that matter is subject to separate litigation.

As to the claim that Washington College is not a museum, and therefore, not subject to compliance with the requirements of NAGPRA, this is purely a question of semantics. While Washington College may not be a museum in the generally accepted meaning of that word, Washington College is not relieved from its obligation to comply with applicable federal law or the specific definition of museum provided under NAGPRA.

In his June 8, 1998, letter to Dr. Francis P. McManamon, of this Committee, in his capacity as Director of the Archeological and Ethnology Program of the National Park Service, Mr. John Toll, President of Washington College, states initially that:

“Although we are not required to respond to your inquiry, we hope that our response will refute the allegations made by Mr. Gough and will foreclose the need for further action.”

President Toll provides no reason, nor offers any grounds upon which to base his belief that Washington College is not required to respond. However, on several occasions in the past, Washington College has claimed that it is not a museum. For example:

- In a letter to the attorney for the Estate of Tasunke Witko, dated May 19, 1996, Mr. Alexander "Sandy" Jones, Chairman of Washington College Legal Affairs Committee, states that:

“The Board of Visitors and Governors received a formal written legal opinion that the artifacts in the ‘Albee Collection’ are...held with good title by Washington College, and that they are exempt from the provisions of 25 U.S.C. 3001, et seq! Relying thereon, the Board requested and received an appraisal from Sotheby's and entered into a contract with Soteby's (sic) to have the collection photographed, displayed, exhibited, cataloged, advertised and sold at public auction. As of this date all of this has been accomplished in a highly professional manner, except for the sale itself which has long been scheduled and will be held at Sotheby's New York auction house on May 21, 1996.”

- In a February 13, 1995, letter to Dr. Arnold Krupat, at Sarah Lawrence College, who was an editor for the Smithsonian Series of Studies in Native American Literatures, Mr. Alexander “Sandy” Jones writes, referring to the Albee Collection, that:

“These contributions were not solicited by Washington College which is not and never has been a ‘museum’ in the generally accepted meaning of that word. However, the college at its expense provided space, vault storage, display cabinets constructed in accordance with Smithsonian specifications, security and insurance.”

Jones further states in the same letter, that:

“The college, which does not purport to be a museum, did what it could reasonably be expected to do under the circumstances ...”

It is of interest to note that in the Sotheby's sale catalogue of Tuesday, May 21, 1996, a photograph of lot item # 172 described as "A Small Plains Dance Ornament" from the "Albee Collection" is shown with an apparently well-worn label tag proclaiming: "Washington College Museum."

In any case, Section 10.2 (3) defines the term "museum" as follows:

Museum means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.

We contend that Washington College is included in any applicable definition of the term "museum" under NAGPRA.

In his response to Dr. McManamon, with regard to the National Park Service inquiry as to whether Washington College has completed a summary or an inventory under 10.8 or 10.9, President Toll admits that Washington College has done neither. Further, Washington College denies refusing to have repatriated any “Native American items” in violation of 43 CFR 10.10, and denies that it has sold any “Native American items” violation of 43 CFR 10.12(b)(i).

As grounds for these denials, President Toll expresses Washington College's position as follows:

“(I)t has consistently been the position of Washington College that the Native American items in its possession did not fall within the categories of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony within the meanings outlined by 43 CFR 10.2(d).”

This has been the consistent position of the College. The Jones' 1995 letter to Dr. Krupat concludes with the remark that:

“It (Washington College) should then seek expert advice to the Board concerning the condition and value of the Indian artifacts and its responsibility, if any, under the Native American Graves and Repatriation Act of 1990, as amended, and its regulations. Armed with this information the Board will make a determination of its proper course of action.”

Our concern today is precisely with this kind of self-interested self-exclusion -- clearly practiced by Washington College -- from the requirements of NAGPRA. Institutions cannot be allowed to by-pass or ignore Native input in a determination of NAGPRA applicability. Without compliance prior to any sale of objects or artifacts, there is no way of assessing the validity of Washington College's claims under the NAGPRA regulations.

Again, Section 10.8 (a) provides that:

(E)ach museum that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony must complete a summary of these collections based upon available information held by the museum. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

Washington College's non-compliance and sale of its collection, without notice to identified interested parties, effectively prevents any fair and open determination of what may or may not satisfy the NAGPRA categorical requirements. The position of Washington College only satisfies its own self-interest and financial gain. The prospect of an institution evading its legal duty and financially profiting from the sale of human remains or sacred objects or objects of cultural patrimony is reprehensible and unlawful.

The collection remained in the possession of Washington College throughout most of the century. The placard in the College's display case provides all the basic information needed to complete a summary under 10.8(c). This is not a case of lack of information or lack of adequate funding necessary to complete the required summary. Further, Washington College can not and does not claim ignorance of the existence of the Native American Graves Protection and Repatriation Act, or of its the requirements, amendments or regulations. Consequently, Washington College cannot be allowed, in its own self-interest, to claim a presumed exemption

from its responsibility to comply with those requirements and regulations of the Native American Graves Protection and Repatriation Act.

CONCLUSION AND RECOMMENDATIONS

The past and present position of Washington College essentially stands for the following proposition:

That any institution, which acknowledges receipt of federal funds, and which has Native American objects and artifacts in its possession, may unilaterally choose whether it wishes to comply with or opt out of the summary or inventory requirements of the Native American Graves Protection and Repatriation Act, based upon its particular self-interest, privately obtained expert advice, undisclosed legal opinions, or other financial determinations made at the sole discretion of that institution's board of directors.

It is precisely this prospect – that is, leaving the question of whether an institution has a duty to comply with federal law up to that institution's own self-interested discretion – that we find setting a most troubling precedent. Allowed to stand, this precedent will effectively pre-empt tribal participation and foreclose federal regulation under the act.

In closing, we have sought the assistance of the NAGPRA Review Committee in moving the Secretary of the Department of the Interior and the National Park Service to make a determination regarding Washington College's admitted non-compliance with the procedural provisions of NAGPRA. Further, we have asked that the Secretary and the National Park Service to assess appropriate civil penalties against Washington College for its failure to complete a summary and/or inventory by November 16, 1995, and prior to its sale of the Albee Collection, on May 21, 1996 and for the subsequent sale.

Now, we do not to bring this matter before you for resolution of these issues on the merits of the case. We are willing to proceed through appropriate administrative and judicial channels. We seek only effective compliance with, and diligent enforcement of, the federal protections provided under the law.

We bring this matter to the attention of this oversight committee at this time in the hope of alerting you to this problem of threshold compliance. Perhaps a suggested remedy might include a technical amendment to require that no sale of any objects or artifacts which may be subject to the provisions of NAGPRA can occur without a written certification of compliance with the summary and inventory provisions of NAGPRA from the applicable federal agency. This would provide notice and assurance to the various auction houses and other venues trafficking in Native American objects and artifacts that their participation in the sale of such items would not aid, abet or promote willful non-compliance with the Native American Graves Protection and Repatriation Act.

To date, there have been no enforcement actions taken under the civil penalty provisions of the act, but this should not be taken as an indication that there are no problems with institutional compliance. Lack of enforcement in such cases as this means that institutions holding objects and artifacts of significant cultural import can effectively evade the balanced legal protections provided for all parties under NAGPRA. It may be that the National Park Service is ill-equipped or ill-disposed to properly carry out the enforcement functions under the Native American Graves Protection and Repatriation Act. The failure of the National Park Service to adequately respond in accordance with the express provisions of the act further compounds the evasion and denigration of this all too necessary federal legislation.

On behalf of the Estate of Tasunke Witko and the Rosebud Sioux Tribe NAGPRA Committee, I thank you for your time and consideration of this matter.

Respectfully submitted this 20th day of April, 1999.

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